88-207

Supreme Court, U.S.
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No.88-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHN T. ROBERTS

Petitioner,

v.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

John T. Roberts
7105 Meadow Lane
Chevy Chase, MD 20815
(202) 785-0990

Petitioner

QUESTION PRESENTED

This petition presents the following question:

> **Is the federal income tax on "capital gain" unconstitutional to the extent it taxes inflation gains, because it is, *pro tanto*, an unapportioned direct tax, twice prohibited by the Constitution?**

or

> **Is the express prohibition in the Constitution against an unapportioned direct tax violated by an unapportioned tax on return of capital which, only because of inflation, appears to be gain?**

PARTIES TO THE PROCEEDING BELOW

The only parties to the proceeding below are the two listed parties, and the wife of the petitioner, Louise S. Roberts.

TABLE OF CONTENTS Page

TABLE OF AUTHORITIES

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John T. Roberts respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, in its cause, No. 87-3755.

OPINIONS BELOW

The opinion of the Court of Appeals, dated May 9, 1988, is unpublished and

appears (1a to 2a). The District Court delivered a bench opinion September 4, 1987 (3a to 4a). The Order was entered on September 8, 1987, (10a).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the District Court was invoked under 28 U.S.C. § 1346(a)(1).

CONSTITUTIONAL PROVISIONS INVOLVED

> "The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises..."
> U.S. Const. art. I, § 8, cl. 1

> "..direct taxes shall be apportioned among the several States...according to their respective numbers..."
> U.S. Const. art. I, § 2, cl. 3

> "No Capitation, or other direct, Tax shall be laid, unless in proportion to the Census of enumeration..."
> U.S. Const. art. I, § 9, cl. 4

> "The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."
> Sixteenth Amendment (1913)

STATEMENT OF THE CASE

This suit presents a constitutional question of first impression at the appellate levels.

The 1984 federal tax return of the petitioner reported certain long-term capital gain from the sale of property with a cost or basis date, in one case, of 1922. Petitioner reported as income the entire excess of the 1984 sale price minus the 1922 cost (adjusted basis).

Between 1922 and 1984, according to the Consumer Price Index, there had been a six-fold inflation, or depreciation in the value of the currency. The Census Bureau reports the income of the American family, in 1986, was slightly lower than in 1973, after accounting for inflation.

In 1985 petitioner filed an amended return seeking a refund of a portion of the

tax paid on the 1984 sale. Petitioner asserted that inflation gain was not income, but a return of capital. The Internal Revenue Service took no action, and petitioner then filed this case.

In the District Court the United States moved for Summary Judgment. It contended, as a matter of law, that total gain on return of capital is taxable, even if it is entirely inflation gain.

The District Court granted the motion in a bench opinion. The Court of Appeals affirmed *per curiam*. It acknowledged neither that a constitutional claim, or a case of first impression, was presented. It cited other cases which neither raised nor answered this claim.

REASONS FOR GRANTING THE WRIT

I. THE CONSTITUTION PROHIBITS A TAX ON THAT PORTION OF ECONOMIC RETURN OF CAPITAL WHICH APPEARS TO BE GAIN ONLY BECAUSE OF INFLATION

A. A CONSTITUTIONAL COMPROMISE RESERVED PROPERTY TAXES TO THE STATES

One of the grand compromises of the Constitutional Convention was that property taxes were largely reserved to the states and commercial taxes were largely given to the federal government. Congress was twice limited to laying only those "direct Taxes" which were "apportioned", i.e. "in proportion to the census of enumeration". Property taxes have historically been recognized as a class of direct taxes. The income tax is unapportioned. If inflation gain is a return of capital, then the income tax imposed thereon is an unapportioned tax on capital an not on income.

B. THE SIXTEENTH AMENDMENT PERMITTED TAXES ON INCOME, NOT ON CAPITAL

Portions of the 1894 Income Tax Act were held unconstitutional, and the entire Act was held unenforceable in *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429, *reh.* 158 U.S.601 (1895) ("*Pollock II*"). It

held that a tax on income derived from property was constitutionally no different than a tax on the property itself.

The Sixteenth Amendment could have broadly repealed the constitutional protection against unapportioned direct taxes. It did not. Rather, it granted to Congress only the power to "...to lay and collect taxes on incomes, from whatever source derived..."(emphasis added)". The framers of the Amendment elected only to permit taxation of income. Nothing in the language or the history of the Amendment supports that it was intended to permit the taxation of capital if inflation (known to their forbearers) were to reappear.

C. A TAX ON INFLATION GAIN IS A TAX ON CAPITAL AND NOT ON INCOME

A long and unbroken line of authority has drawn a clear distinction between income and property for the purpose of taxation. When income is taxed on the conversion of property, the taxpayer is entitled to a return of capital, free of

any tax. See *Burnet v. Logan,* 283 U.S. 404 (1931).

What then constitutes a return of capital in inflationary times -- an economic return or a mere nominal return? The answer appears clear.

From the government:

> "..(During inflation) capital gains are illusory, either entirely or in part."

U.S. Dep't of the Treasury, Federal Income Tax Treatment of Capital Gains and Losses (1951) at 19.

From academia:

> "..(When) an asset price only keeps pace with consumer prices .... No properly defined income has been generated...."
>
> "Thus inflation converts an ordinary income tax [on gains] into a kind of wealth tax."

H. Aaron, Ed.,Inflation and the Income Tax (1976) at 17 and 37.

What then did the authors of the Sixteenth Amendment mean by "incomes"? Did they mean real income or illusory income? They had the option of taxing capital openly and without restriction. Did they mean to respect the prohibition

against unapportioned taxation of capital, or did they mean to leave the loophole open for such taxation of capital if it could be called "income", however illusory? Chief Justice Marshall supplied the test in *Gibbons v. Ogden,* 9 Wheat. (22 U.S.) 1 (1824) at 188:

> "As men, whose intentions required no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, [the framers and adopters of the Constitution] must be understood to have employed the words in their natural sense, and to have intended what they said."

According to this test the congressional framers of the Sixteenth Amendment must have intended "income" to directly and aptly express an idea, namely real income which excludes return of capital.

II THE *PER CURIAM* DENIAL OF A SUBSTANTIAL CONSTITUTIONAL QUESTION OF FIRST IMPRESSION MAY WARRANT THIS COURT'S EXERCISE OF ITS SUPERVISORY POWER

One case, *infra,* has held inflation gains taxable. Petitioner has brought this

lawsuit in the belief that the earlier case is wrongly decided, as a matter of constitutional interpretation.

The District Court expressed disquietude about the "soundness" of the earlier case (11a), and went on to rely on other authority. The Court of Appeals decided, *per curiam*, that the District Court had reached the correct result. It then cited the earlier case. Did it share with the District Court disquietude about the soundness of that earlier case?

More importantly, did the Court below have a view about petitioner's main argument above? Had it stated its position, the job of this Court would be simpler. *Per curiam* decisions are not useful to a reviewing court in a case where the practice is concededly settled, but the legal basis is, at best, constitutionally suspect.

This Court ought not to be a court of original jurisdiction over constitutional issues. The lower courts should assist this Court with their analysis of constitutional issues on which their decisions rest.

That earlier case, *Hellermann v. Commissioner*, 77 T.C. 1361 (1981) held that inflation gain was taxable as "income". Yet *Hellerman* refused to deal with the prohibition against direct taxation or with the question of whether the Amendment permitted the taxation of inflation gain return of capital as "income". Instead the Tax Court concluded that congress had the constitutional power to tax inflation gain as income because it had power to devalue the currency. *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871) and *The Gold Clause Cases*, 294 U.S. 240 (1935), (relied on by *Hellermann*), found an implied congressional power to devalue the currency. However neither of these cases construed or even involved the taxing power. Nothing in either case suggests a power to tax a return of capital by calling it income.

Furthermore both *The Legal Tender Cases* and *The Gold Clause Cases* deny, not support such an implied power. Both note the limitation, expressed by Chief Justice Marshall, that the implied power include only those "which are not prohibited",

McCulloch v. Maryland, 4 Wheat.(17 U.S.) 416 (1819) at 421. Here the opposite is true: the power to lay an unapportioned direct tax is twice expressly prohibited by the Constitution.

A summary remand would allow the Court below to state whether 1) inflation gains are income, or 2) Congress has an implied power to tax this property, or 3) the secondary authority precludes any constitutional challenge to a power derived from the power to devalue currency.

III THIS TAX IS A VIOLATION OF A RIGHT GUARANTEED BY THE CONSTITUTION, ANNUALLY AFFECTING LARGE NUMBERS OF TAXPAYERS

Many constitutional claims may be deferred, responsibly, when first raised. This is not of that class. Large numbers, literally millions, of Americans hold property in which some or most of the gain is inflation gain. Every year large numbers of those Americans are called upon to pay an unapportioned tax on inflation gains.

The conventional wisdom for sixty years has been that inflation gains are taxable, but nobody knows exactly why. One 1981 Tax Court case had the opportunity to state why but avoided coming to grips with the constitutional prohibition that is at the heart of this case. And now there are two unpublished decisions below that rely essentially only on that Tax Court case.

The responsible course for this court is to acknowledge the existence of this question and to deal with it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John T. Roberts
7105 Meadow Lane
Chevy Chase, MD 20815
202-785-0990

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNPUBLISHED

No. 87-3755

JOHN T. ROBERTS

Plaintiff-Appellant

and

LOUISE S. ROBERTS

Plaintiff

v.

UNITED STATES OF AMERICA

Defendant-Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, District Judge.

(C/A No. 86-2127-HM)

Submitted: March 30, 1988 Decided: May 9, 1988

Before HALL and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

PER CURIAM:

John T. Roberts* appeals from the district court's summary judgment in his suit claiming overpayment of income taxes. In his suit, Roberts asserts that an "inflation gain" realized on his sale of securities in 1984 does not represent "taxable income."

A review of the record, the district court's opinion, and the briefs submitted by the parties to this appeal reveals that the district court's determination that the Robertses were not

entitled to an income tax refund was proper. Hellermann v. Commissioner, 77 T.C. 1361 (Tax Ct. 1981); Birkenstock v. Commissioner, 646 F.2d 1185 (7th Cir. 1981); Bates v. United States, 108 F.2d 407 (7th Cir. 1939), cert. denied, 309 U.S. 666 (1940).

Because the facts and legal contentions are adequately developed in the materials before the court and oral argument would not aid in the decisional process, we dispense with argument in this case.

AFFIRMED

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* Louise S. Roberts is not a party to this appeal because she, proceeding pro se, failed to sign the notice of appeal. Fed. R. App. P. 3(c); Covington v. Allsbrook, 636 F.2d 63 (4th Cir. 1980), cert. denied, 451 u.S. 914 (1981).

IN THE UNITED STATES DISTRICT

FOR THE DISTRICT OF MARYLAND

JOHN T. ROBERTS and	)	
LOUISE S. ROBERTS	)	
	)	
V.	)	Case No. HM-86-2127
	)	Civil Action
THE UNITED STATES		
OF AMERICA.	)	
	)	
_____	)	

Baltimore, Maryland

September 4, 1987

The above-entitled case came on for Hearing of The United States of America's Motion for Summary Judgment before His Honor, Herbert F. Murray, at 10:30 am.

TRANSCRIPT OF PROCEEDINGS

THE COURT: The matters raised in the motion are of compelling interest to the Court. I though what I would do would be to rule on the matter while it is fresh in mind and I am going to read a bench opinion in connection with it.

John and Louise Roberts realized a gain on the sale of certain stock holdings in 1984. They paid the federal income taxes due on the gain in a timely fashion. They have now brought suit against the United States in this court for a refund of a portion-- $32,732 -- of the money they paid on their 1984 tax bill.

According to the complaint, a major portion of the gain on the sale of stock was attributable to rises in the price of stock created solely by inflation. The plaintiffs

argue that any increase in the value of the stock attributable to inflation or devaluation of the dollar may not constitutionally be taxed as income. They argue that inflation-induced gains do not represent real or economic increases in property value and so are, in fact, not "income" within the meaning of the Sixteenth Amendment. Rather, according to plaintiffs, inflationary gains represent a return of capital the direct taxation of which is unconstitutional without apportionment.

The defendant, the United States of America, has filed a motion for summary judgment. The parties agree that the dispositive legal issue in this case is whether Congress constitutionally may levy an unapportioned direct tax on realized gains that are solely attributable to inflation. If so, the defendant is entitled to judgment

as a matter of law.

The Court has considered the written and oral arguments of the parties and is now prepared to rule on the defendant's motion.

The United States Constitution imposes several limitations on the federal taxing power. Most significant in this case are the requirements that direct taxes be apportioned among the states, U.S. Constitution, Article 1, Section 2, Clause 3, in proportion to the census.

The Sixteenth Amendment, however, allows Congress to tax "income, from whatever source derived, without apportionment among the several states and, without regard to any census or enumeration."

The parties concede that a tax on the gain realized from the sale of property is a direct tax. See Simmons v. United States, 308 F.2d 160 at 166 (4th Cir. 1962). The

question then is whether property gains solely attributable to inflation constitute "income" within the meaning of the Sixteenth Amendment.

Plaintiffs are unable to provide the Court with any cases supporting their position that the Sixteenth Amendment does not allow unapportioned taxation of so-called inflation gains. Their argument is instead historical and economic. The plaintiffs seem to contend that since the government went off the gold standard, the country's currency lost any intrinsic value. This state of affairs, coupled with the increased power over the federal money supply delegated to the federal reserve system, resulted in a debasement of the currency and concomitant inflation not contemplated at the time the

Sixteenth Amendment was adopted.

Implicitly, it seems, the plaintiffs are arguing that the word "incomes" in the Sixteenth Amendment could not have been meant to include increases in property values attributable to inflation because inflation, as Americans know, was virtually nonexistent at the time the amendment was adopted. The plaintiffs also argue that income should be defined in strictly economic terms and should include only value increases independent of inflationary forces.

The Court is unpersuaded by the plaintiffs' arguments. Though plaintiffs suggest in their brief that this is an issue of virtual first impression, the Court finds that several cases bearing on this issue have been decided in a manner unfavorable to plaintiffs' position.

In Hellermann v. Commissioner, 77 Tax

Court, 1361, a 1981 decision, the Tax Court rejected the argument that inflationary gains are not taxable income within the meaning of the Sixteenth Amendment. The court reasoned that what is important in determining income is not intrinsic value, but legal value, which remains constant over time. The court resorted to a common-sense approach to defining income. According to the court, ". . . the meaning of income is not to be construed as an economist might but as a lay person might." Hellermann at 1366.

Plaintiffs do not disregard Hellermann but suggest instead that it was erroneously decided and grounded in faulty reasoning. The plaintiffs suggest that the Tax Court relied on cases not directly in point. They further argue that a common understanding of income today would not include inflation gains, particularly in light of the American

experience with inflation in the recent past.

Even were the Court to concede plaintiffs' points on the soundness of Hellermann, there is additional case authority that has not been addressed by the plaintiffs and which, in the opinion of the Court, settles the issue in this case.

In Bates v. United States, 40-1 U.S. Tax Court, Paragraph 9382 (7th Cir. 1940), the Seventh Circuit held that a change in the statutory gold content of the dollar was not a relevant consideration in determining tax liability on a sale of securities. The taxpayer had argued, much as the taxpayers in this court, that the gain realized on the sale of securities was attributable to debasement of the currency occasioned by the reduction in the statutory gold content of the dollar. In a persuasive opinion, the Seventh Circuit rejected these arguments,

stating, "The standard unit of computation is the dollar, an abstract or ideal unit of account. This standard unit of money has not changed in money value throughout the existence of our monetary system. There have been changes from time to time in the form of physical representatives of money, but lawful money has been the same" since Congress established the dollar in 1792, Bates at page 408.

In addition to Bates and Hellermann, there are numerous cases that challenge the validity of our monetary system as it pertains to taxation. The courts have uniformly rejected challenges to the tax law based on the alleged infirmity of American currency. See, e.g., U.S. v. Benson, 592 F.2d 495 (5th Cir. 1979) (characterizing as "frivolous" the argument that federal reserve notes do not constitute income for tax

purposes); U.S. v. Wangrud, 533 F.2d 257 (5th Cir. 1976) (finding "absolutely no merit" in defendant's argument that since his pay checks could only be cashed for federal reserve notes not redeemable in specie, he did not receive "money" in the tax years in question); U.S. v. Tissi, 601 F.2d 372 (8th Cir. 1979) (finding no error in trial court's refusal to allow a "monetary realist" to testify that federal reserve notes do not constitute income within the meaning of the internal revenue code.)

Because plaintiffs are unable to supply the Court with any authority supporting the proposition that unapportioned taxation of inflationary property gains is unconstitutional and because the Court finds that the only available authority upholds the constitutionality of such taxation, and because the Court is unpersuaded by the

plaintiffs' historical and economic arguments, the decision of the Court is that defendant's motion will be granted and I will ask Mr. Salem to submit an appropriate order for my signature to that effect.

IN THE UNITED STATES DISTRICT

FOR THE DISTRICT OF MARYLAND

JOHN T. ROBERTS, et ux.)

Plaintiffs)

)

V.) CIVIL ACTION NO.

HM-86-2127

)

UNITED STATES)

Defendant.)

_____)

ORDER

Having considered defendant's motion for summary judgment, together with the memorandum in support thereof, having considered plaintiffs' opposition thereto, and having heard the arguments of the parties at a hearing held on September 4, 1987, the Court concludes that there are no material

issues of fact outstanding and that defendant is entitled to judgment as a matter of law. Accordingly, it is this 8th day of September, 1987,

ORDERED that defendant's motion for summary judgment be and hereby is GRANTED;

ORDERED that the instant action be and hereby is DISMISSED with prejudice; and it is further

ORDERED that the Clerk shall distribute conformed copies of this order to the parties and representatives of the parties listed below.

/s/ Herbert F. Murray
United States District Judge